NO. 82-1330

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MORRIS L. THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL.,

Petitioners,

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF OF AMICUS CURIAE SUPPORTING ORAL ARGUMENT TO BE PRESENTED ON INVITATION FROM THE COURT IN SUPPORT OF THE JUDGMENT BELOW

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REPLY TO BRIEF OF AMICUS CURIAE SUPPORTING ORAL ARGUMENT TO BE PRESENTED ON INVITATION FROM THE COURT IN SUPPORT OF THE JUDGMENT BELOW

I. BLOCKBURGER: FACTS VS. ELEMENTS

The preponderant theme of the position taken by amicus curiae is that the limiting of double jeopardy to a statutory analysis versus a factual analysis would unreasonably constrict the historic protection against double jeopardy. We note the recent discussion of the Mississippi Supreme Court in Smith v. State, 429 So.2d 252 (Miss. 1983):

> Appellant contends that his trial and convcition under the burglary charge in the case sub judice exposed him to double jeopardy under the United States and Mississippi Constitutions.
>
> We have thoroughly researched this question presented under the facts, evidence and indictments resulting in appellant's convictions

and are forced to the conclusion that the state was legally and constitutionally justified in indicting, trying and convicting appellant under both the rape charge and the burglary charge.

The bellwether case applicable to the question before us in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1931). In that case the charges grew out of an essentially same set of facts that resulted in multiple indictments and convictions regarding the sale of narcotics. The court, through Mr. Justice Sutherland, set out the primary principle involved in problems such as that now before us. There it was stated:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statute provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, 55 L.Ed. 489, 490,

> 31 S.Ct. 421, and authorities cited. In that case this Court quoted from the adopted the language of the Supreme Court of Massachusetts in Money v. Com., 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."
>
> (284 U.S. at 304, 52 S.Ct. 182, 76 L.Ed. 309).
>
> Id., at 254.

In conclusion the Court held:

> Applying the principles in the above discussed cases and examining the burglary and rape statutes under which appellant was convicted in separate trials, we find that the essential elements of the criminal charges in each statute are entirely different. As stated in Blockburger, supra, "each of the offenses created required proof of a different element." Although most of the testimony in both trials were essentially the same, this testimony was admissible under the res gestae rule. An examination of the rape conviction reveals that appellant here

> did not testify; whereas, he testified in the present burglary trial. It is inescapable that when appellant, as found by the jury, broke and entered the dwelling, during the nighttime, armed with a deadly weapon, with the intent to commit a crime, he had concluded the statutory requirements under the burglary charge. We hold that a conviction under this charge was not constitutionally prohibited under the double jeopardy provisions of the Constitutions.
>
> Id., at 257.

See also: United States v. Mulherin, 710 F.2d 731 (11th Cir. 1983); United States v. Brown, 692 F.2d 345 (5th Cir. 1982); United States v. Pearson, 655 F.2d 569 (5th Cir. 1981); United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Rodriquez, 612 F.2d 906 (5th Cir. 1980); United States v. Cowart, 595 F.2d 1023 (5th Cir. 1979); United States v. Dunbar, 591 F.2d 1190 (5th Cir. 1979); Beckley v. State, 357 So.2d 1022 (Ala. Cr. App. 1978); State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (N.C. 1980); People v. Flores, 92 Mich. App. 130, 284 N.W.2d 510 (Mich. App. 1979); Hughes

v. State, 401 So.2d 1100 (Miss. 1981).

Likewise, we find that in the matter sub judice there is a lack of mutuality between the elements of manslaughter by culpable negligence and reckless driving under Miss. Code Anno. §§ 97-3-47 and 63-3-1201 (1972). To hold as advocated by amicus curiae, this Court would negate the State's ability to prosecute by separate indictment for all offenses arising out of the same act or transaction or from a common scheme or plan. Within this context, we note the ruling of the Mississippi Supreme Court in Stinson v. State, 443 So.2d 869, 873 (Miss. 1983), holding that "it was error for the state to charge . . . [a defendant] in three separate counts for separate and distinct offenses . . .." The impact of the ruling herein became exceedingly clear in the recent case of Davis v. Herring, N.D. Miss. No. EC83-175-WK-O (Report and Recommendation of Magistrate Orlansky, dated May 19,

1983, adopted as the opinion of the Court on June 6, 1983), appeal docketed, No. 83-4421 (5th Cir, July 1, 1983), wherein the Court relying upon the decision herein held that the subsequent prosecution of the petitioner for shooting into an occupied dwelling under Miss. Code Anno. § 97-37-29 (1972) after a conviction of manslaughter under Miss. Code Anno. § 97-3-47 (1972) was a violation of the Double Jeopardy Clause even though there were four (4) other people in the building.

Petitioner submits that the ruling by the Fifth Circuit in the instant matter is a radical departure from past precedent. While admittedly the same evidence was introduced in support of both the reckless driving charge and the manslaughter charge, such is not comensorate with the "same evidence" test in Blockburger v. United States, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct.

180 (1932). We find the comments of the Fifth Circuit in United States v. Cowart, supra, at 1023-24, to be instructive:

> To determine whether defendant was subject to multiple punishment for the same offense, we look to the leading case of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 86 L.Ed. 306 (1932), where the Supreme Court of the United States formulated the applicable standard.
>
> > The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.
>
> 284 U.S. at 304, 52 S.Ct. at 182. See also Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); Jeffers v. United States, 432 U.S. 137, 151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977).
>
> This standard frequently has been referred to as the "same evidence" test; however, the Blockburger test

looks not to the evidence adduced at trial but fucuses on the elements of the offense charged. Brown v. Ohio 432 U.S. at 166, 97 S.Ct. at 2225 (Blockburger test emphasizes the elements of the two crimes): Iannelli v. United States, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ("If each [offense] requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."); United States v. Dunbar, 591 F.2d 1190, 1193 (5th Cir. 1979) ("Application of the [Blockburger] test focuses on the statutory elements of the offenses charges."). An examination of the elements of the respective offenses of "conspiracy" and "aiding and abetting" demonstrates that Cowart was convicted of two, separate and distinuishable offenses.

As we stated previously, an examination of the statutory offenses here involved reveals that each contains elements not common to the other. The offense of reckless driving is predicated upon the manner of the operation of a motor vehicle and is in no way dependant upon any resultant injury to persons or property. See: Barnes v. State, 249 Miss. 482, 162 So.2d 865 (1964);

Gause v. State, 203 Miss. 377, 34 So.2d 729 (1948); Sanford v. State, 195 Miss. 896, 16 So. 2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide but is not restricted as to either instrumentality or location. Gandy v. State, 373 So.2d 1042 (Miss. 1979). See also: Cutshall v. State, 191 Miss. 764, 4 So.2d 289 (1941). Consequently, we are not confronted with the situation found in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980), where the defendant was charged with manslaughter under a specific statute governing homicide while operating a motor vehicle. See 9-3 of the Illinois Criminal Code, Ill. Rev. Stat., Ch. 38, § 9-3 (1973). The crime of reckless driving under Miss. Code Anno. § 63-3-1201 (1972) is separate and distinct crime from that of manslaughter by culpable negligence under Miss. Code Anno. § 97-3-47 (1972), and it was,

therefore, error for the lower Federal courts to hold that the conviction of manslaughter herein constituted a violation of the Double Jeopardy Clause.

II. THE ISSUE OF THE TRIAL DE NOVO

Amicus Curiae asserts in his brief in support of oral argument that the petitioner has in violation of the rules of this Court attempted to insert a new issue which was not raised in the Petition for Writ of Certiorari.

The discussion of the law concerning trials de novo may not be divorced from the Court's consideration of the issues herein. Sup. Ct. Rule 34.1(a); Procunier v. Navarette, 484 U.S. 555, 55 L.Ed.2d 24, 98 S.Ct. 853 (1978); Lake Country Estates v. Tahoe Planning Agcy., 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979). The fact that the double jeopardy issue arose in the procedural setting of an appeal from the Justice

Court to the Circuit Court was clearly set forth in the Statement of the Case. Garner v. United States, 424 U.S. 648, 47 L.Ed.2d 370, 96 S.Ct. 1178 (1976).

Within this context, we note that the inclusion of the discussion of Colten v. Kentucky, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), was not so much the injection of a new issue but the discussion of the procedure by which the two charges in question proceeded through the State courts.

We note in particular the sharply defined distinction between Vitale and the matter sub judice when considered in light of Colten. Unlike Vitale who pled guilty to a charge of failing to reduce speed and later sought no further relief on the issue, the respondent herein entered a plea of guilty to a number of motor vehicle offenses in Justice Court and on the same day

perfected his appeal to the Circuit Court.

Consequently, petitioner submits that the discussion of Colten was fairly comprised within the petition for Writ of Certiorari and should be considered by the Court as a subsidiary issue herein. Alternatively, we note that respondent did not raise this issue in his reply and must be contrued to have waived his objection. Castaneda v. Partida, 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977).

III. CONCLUSION

For these reasons and those previously discussed, petitioner respectfully urges the Court to reverse the decision of both the Court of Appeals and the District Court.

Respectfully submitted,

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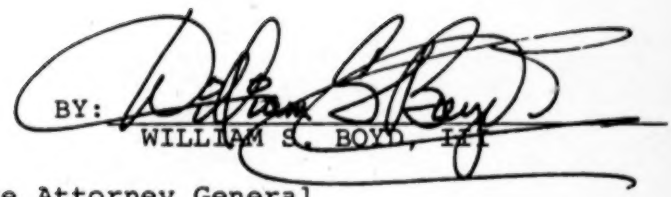
BY: 
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

STANLEY L. DAVIS, Petitioner

NO. EC 83-175-WK-O

ROBERT HERRING, et al RESPONDENTS

REPORT AND RECOMMENDATIONS

Petitioner Stanley L. Davis is a prisioner of the State of Mississippi presently in the physical custody of respondent Robert Herring, Sheriff of Lee County, awaiting trial on an indictment charging him with shooting into an occupied building in violation of §97-37-29, Mississippi Code (1972). In his pro se petition Davis contends that his continued prosecution on the §97-37-29 charge causes him to be placed twice in jeopardy in violation of the Fifth and Fourteenth Amendments to the federal constitution because on an earlier date he was convicted of manslaughter in the Circuit Court of Lee County and sentenced to serve a term of eighteen years

in the Missisippi Department of Corrections by reason of the identical incident out of which the §97-37-29 charge arises and on proof which was identical with that which the state will offer against him if he is tried on that charge.[1/]

Because the Court of Appeals for the Fifth Circuit has recognized that

> "[d]double jeopardy is not a mere defense to a criminal charge; it is right to be free from a second *prosecution*, not merely a second *punishment* for the same offense (through that is obviously included in the right). The prohibition of the Double Jeopardy Clauses is 'not against being twice punished, but against being twice put in jeopardy.'" (Citations omitted.) Fain v. Duff, 488 F. 2d 218, 224 (5 Cir. 1973);

[1/] Petitioner also sought damage and injunctive relief under 42 U.S.C. §1983, but by order dated May 11, 1983 the magistrate directed that the habeas and §1983 claims be served and proceded with separately, pursuant to Rule 42(b), Federal Rules of Civil Procedure; that Davis' §1983 claims be docketed as a separate action an amended complaint stating separately his claims under §1983. Under the terms of that order only Davis' habeas claims remain pending in this action.

and because the petition indicated that petitioner's trial on the §97-37-29 charge was scheduled to begin on May 31, 1983 it became obvious that this is one of the rare habeas petitions by a state prisoner to the petitioner's state court trial and possible conviction.

Further, because of the imminence of petitioner's scheduled trial date, it was recognized that petitioner's right not to be placed twice in jeopardy might, even if his contention should be well taken, be defeated should his state court trial take place before this court could dispose of the merits of his constitutional claim. Accordingly, counsel was appointed to represent petitioner, and a hearing was scheduled for May 18, 1983 at Greenville on the issue of whether or not the state court proceedings should be stayed pending this court's resolution of the double jeopardy issue on the merits. See, Robinson v. Wade, 688 F.2d 298, 302, n. 7 (5 Cir. 1982).

However, at the outset of the stay hearing it was announced by counsel for both petitioner and respondents that they were prepared to proceed on the merits of the double jeopardy issue. A stay hearing being, for all practical purposes, the functional equivalent of a preliminary injunction hearing, Robinson v. Wade, supra, it was appropriate, in view of the readiness of the parties to proceed on the merits, to advance trial of the action on the merits and consolidate it with the stay hearing under the provisions of Rule 65(a) (2), Federal Rules of Civil Procedure. The hearing then proceeded on the merits of petitioner's double jeopardy claim.

It is recommended that the court adopt the following as the findings of a fact and conclusions of law required by Rule 52(a), Federal Rules of Civil Procedure.

Since the custody which petitioner attacks is pretrial, and thus is not "... pursuant to the judgment of a State court" within the

meaning of 28 U.S.C. §2254(a), his petition does not sound under §2254, but under 28 U.S.C. §2241(c) (3), which provides for habeas corpus relief for all persons held "... in custody in violation of the Constitution or laws or treaties of the United States." Thus, the express statutory exhaustion of state remedies requirement of 28 U.S.C. §2254(b) & (c) is inapplicable here. This is a distinction without a difference, however, since, under principles of comity, exhaustion of state remedies has long been held a prerequisite to relief under §2241(c) (3). Ex parte Royall, 117, U.S. 240 (1886); Robinson v. Wade, supra, at 303, n. 8.

Exhaustion is an issue which need not detain the court long because it is clear, as counsel for respondent conceded at the hearing, that petitioner has presented the substance of his constitutional claims to the state courts of Mississippi in such fashion as to afford the state courts a fair opportunity to rule on the merits of those claims and has been denied relief. This is all that the

exhaustion doctrine requires. Picard v. Connor, 404 U.S. 270, 275 (1971). This was accomplished by a motion in the trial court to quash the indictment on double jeopardy grounds. That motion was denied. Subsequently petitioner sought a writ of prohibition from the Supreme Court of Mississippi, which was denied without prejudice to petitioner's raising the double jeopardy defense in the trial court and urging it on any appeal, if convicted (Exhibit P-6). Petitioner has thus afforded the state courts an opportunity to consider the merits of his constitutional claims prior to his being placed on trial, and has been denied relief. Accordingly, as respondents concede, he has exhausted his available state remedies, and it is appropriate for the court to consider the merits of his double jeopardy claim.

The relevant facts are simple, straightforward and not in dispute. On October 28, 1981 petitioner fired a series of shots, estimated by the witnesses to be either five

or six in number, from a vehicle into a building leased and operated by one Wayne Watson as a lounge under the trade name of Seay's Lounge in Lee County. At the time the shots were fired the lounge was occupied by Watson, his wife, and three other persons. At least five of the bullets fired by petitioner entered the building, and one of them struck and killed Watson. At least one other shot struck the exterior of the building, but did not penetrate the wall. None of the other four persons inside the lounge were shot or injured as a result of the shooting, although all of them fell to the floor for protection, and Mrs. Watson suffered understandable shock and emotional trauma. All of the shots were fired in rapid succession during a very brief period of time.

In November, 1981 petitioner was indicated for murder in the death of Watson. He was duly tired on that indictment in the Circuit Court of Lee County, and on September 2, 1982 a jury returned a verdict finding him guilty of man-

slaughter. He was sentenced to a term of 18 years in the Mississippi Department of Corrections. On February 1, 1982 Petitioner was also indicated for the offense of shooting into an occupied building in violation of § 97-37-29, Mississippi Code (1972). That indictment was based upon the same shooting spree which led to petitioner's manslaughter conviction. The charge is presently pending in the Circuit Court of Lee County and is set for trial on June 14, 1983. John R. Young, District Attorney for the First Circuit Court District, of which Lee County is a part, and Joe Blair Timmons, County Prosecuting Attorney, testified without contradiction that the same evidence as was offered against petitioner in his murder trial will be used against him in the trial for shooting into a building.

Although petitioner fired several times, and through at least five bullets penetrated into the interior of the lounge, only one of them struck Watson. Neverthless, responsdents

do not take the position that petitioner's firing of multiple shots into the building constituted a series of separate criminal acts. Instead, they conceded at the hearing that the shots fired by petitioner, coming as they did in such rapid succession and within such a brief period of time, were the result of a single impulse and thus constituted but a single criminal act. See, Blockburger v. United States, 284 U.S. 299, 302 (1932). Accordingly, the court is not presented with the issue of whether or not petitioner may be separately prosecuted for each shot which he fired.

The double jeopardy clause affords protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Albernaz v. United States, 450 U.S. 333, 343 (1981); Whalen v. United States, 445 U.S. 684, 688 (1980); Brown v. Ohio, 432 U.S.

161, 165 (1977); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

The classic formulation of the double jeopardy test is drawn from the court's opinion in Blockburger v. United States, supra.

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.... 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" 284 U.S. at 304.

Thus, the test is not whether one or the other of the two statutes in question requires proof of some additional fact which the other does not, but whether each statute requires proof of some fact which the other does not.

In Whalen v. United States, supra, the Supreme Court characterized the Blockburger rule as one of statutory construction and stated:

> "The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." 445 U.S., at 691-692.

This, the intent of the ligislative body, in this case the Mississippi Legislature, which enacted the statutes in question must be taken into account if it can be ascertained. However, in the absence of a clear indication of legislative intent to authorize cumulative punishments, there is a presumption that cumulative punishment was not the intent of the legislature. On the other hand, if there is a clear indication of legislative intent to impose cumulative punishment, the Blockburger test is inapplicable, since it merely serves as a means of discerning legilative intent. Missouri v. Hunter, ___, ___; 74 L.Ed. 2d 535, 543 (1983); Albernaz v. United States, supra, at 340. If the legislative body intended to

impose multiple punishments, such punishments do not violate the double jeopardy clause. Missouri v. Hunter, supra,at 543; Albernaz v. United States, supra, at 344.

Thus, the proper sequence of analysis is to first ask, what did the legislature intend? Is it clear from the statutes in question whether the legislature intended two punishments or only one, or is it unclear? If the legislative intent is not clear, then it is necessary to proceed to the next step, which is the Blockburger test--whether or not the two statutes each require proof of some unique fact which the other does not.

The statute under which petitioner is presently indicated, §97-37-29, Mississippi Code (1972), reads as

> "If any person shall wilfully and unlawfully shoot or discharge any pistol, shotgun, rifle or firearm of any nature or description into any dwelling house or any other building usually occupied by persons, whether actually occupied or not, he shall be guilty of a felony whether or not anybody be injured thereby, and, on conviction thereof, shall be punished by imprisonment in the state penitentiary for a term not to exceed

ten (10) years, or by imprisonment in the county jail for not more than one (1) year, or by fine of not more than five thousand dollars ($5,000.00), or by both such imprisonment and fine, within the discretion of the court."

The crime of murder is defined by §97-3-19, Mississippi Code (1972) as:

"The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

"(a) When done with deliberate design to effect the death of the person killed or of any human being;

"(b) When done in the commission of an act imminently dangerous to others and evidencing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

"(c) When done without any design to effect death by any person engaged in the commission of rape, burglary, arson, or robbery, or in any attempt to commit such felonies."

Under the provisions of § 97-3-47, Mississippi Code (1972);

"Every other killing of a human being by the act, procurement or culpable negligence of another and without authority of law not provided for in this Title, shall be manslaughter."

The court has been provided with no

legislative history of these statutes, and there is nothing in the language of any of them to indicate whether or not, in adopting §97-37-29, the state legislature intended to enhance the punishment for murder or manslaughter if committed as a result of firing into an occupied building. There is certainly no evidence of a clear legislative intent to do so.

It appears likely that § 97-37-25 was enacted to fill a perceived gap in Mississippi's scheme of criminal law in order to discourage shootings into dwellings and other buildings normally occupied by human beings by enacting a specific criminal statute providing a severe penalty for such acts, whether or not the building is actually occupied at the time of the shooting, and whether or not any person is actually injured. However, there is no clear manifestation of a legislative intent to provide cumulative punishments in these circumstances. Thus, the Blockburger test must be applied.

The Supreme Court of Mississippi has never authoritatively construed §97-37-29, and there is therefore no interpretative gloss to aid the court's analysis of that statute. On the other hand, there have been many Mississippi decisions construing the murder (§97-3-19) and manslaughter (§97-3-47) statutes. It is unnecessary to engage in a detailed comparison of the statutes, however, because it is obvious from their language that not every shooting into a dwelling or building normally occupied by humans will constitute murder or manslaughter, and that not every murder or manslaughter, as defined in the Mississippi statutes, will come about as the result of a shooting into an occuped building. It is thus clear that shooting into an occupied building may be, but is not necessarily, a lesser included offense of murder or manslaughter. It is settled double jeopardy law that conviction of the greater offense bars a subsequent prosecution for a lesser included

offense. Harris v. Oklahoma, 433 U.S. 692 (1977); Brown v. Ohio, supra, at 168.

In Illinois v. Vitale, 447 U.S. 410 (1980), the Supreme Court, recognizing that ".... the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial...," 447 U.S., at 416, also recognized the existence of a modified test to be applied in cases where the lesser crime may be, but is not always, a constituent or lesser included offense of the greater crime.

Vitale involved an attempted prosecution for manslaughter after conviction of the defendant for failing to reduce speed to avoid an accident. The defendant had struck two small children while driving an automobile, and both of the children were killed. It was not clear to the court in VItale that under Illinois law every offense of manslaughter by motor vehicle necessarily also involved a failure to reduce speed to avoid an accident. Of course, it was obvious that not every

every failure to reduce speed to avoid an accident constituted vehicular manslaughter. For that type of case the court recognized the existence of an "evidence" test.

> "in any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 692 (1977).
>
> " In *Harris*, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purpose of the Double Jeopardy Clauses, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a

> killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nelson*, 131 U.S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense-an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.
>
> "By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid the accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." 447 U.S., at 420-421.

Because of its uncertainty as to the state of Illinois law, and because the acts which the state would rely on to prove manslaughter were unknown, the Supreme Court remanded Vitale to

the Illinois courts for further proceedings.

The "evidence" test of Vitale was applied by the Court of Appeals for the Fifth Circuit in its unpublished opinion in Roberts v. Thigpen, No. 82-4067, decided November 16, 1982 affirming this court's grant of habeas corpus relief to a petitioner claiming violation of the double jeopardy clause arising out of his conviction of manslaughter after haing previously been tried and convicted of reckless driving as a result of the same motor vehicle accident. In Roberts, the court said:

> "The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter Roberts had a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Roberts's conviction on the misdemeanor charge was also introduced in the manslaughter trial. The trial court's instructions to the jury leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter." Slip op. pp. 7-9.

A copy of the court's opinion in Roberts is appended hereto.

In this case there is not, as there was in Vitale, any uncertainty or doubt that the state intends to offer against petitioner at his trial for shooting into an occupied building the very same evidence which it offered against him at his murder trial. In attempting to prove petitioner guilty of murder, and in proving him guilty of manslaughter, the state proved that he intentionally and without lawful cause shot a pistol into Seay's Lounge, a place of public accommodation, and thus a building usually occupied by persons. It is precisely that same evidence which will be offered to attempt to prove him guilty of shooting into an occupied building. The fact that it was also necessary, in order to convict petitioner of manslaughter, to prove that Watson was killed as a result of the shooting does not satisfy the Blockburger test, since proof of a unique fact must be necessary in order to establish each offense. The court

must therefore conclude that petitioner's prosecution for the offense of shooting into an occupied building places him twice in jeopardy for the same offense in violation of rights guaranteed him by the double jeopardy clause of the Fifth Amendment, made applicable to the states through the Fourteenth. See, Brown v. Ohio, supra, at 164.

In opposing the petition respondent has relied heaviliy on the recent decision of the Supreme Court in Missouri v. Hunter, supra. However, that decision is readily distinguishable on two grounds. First, the Missouri legislature expressly provided in the armed criminal action statute there under consideration that punishment under that statute was to be in addition to the punishment provided by law for the underlying crime. 74 L.Ed 2d, at 539-540. There is, of course, no such clear expression of legislative intent in this case. Second, although probably not of conrolling significance, see, Brown v. Ohio, supra,

at 166, the precise issue decided by the Supreme Court in Hunter was "... whether the prosecution and conviction of a criminal defendant in a single trial on both a charge of 'armed criminal action' and a charge of first degree robbery--the underlying felony--violates the Double Jeopardy Clause of the Fifth Amendment." 74 L.Ed.2d, at 538. This case, of course, does not involve imposition of cumulative punishments in a single trial. Missouri v. Hunter is therefore not controlling here.

It is therefore recommended that the petition be granted and that the writ issue directing that petitioner be discharged from the custody of the respondents in connection with his presently pending prosecution in the Circuit Court of Lee County for the offense of shooting into an occupied building in violation of §97-37-29, Mississippi Code (1972).[2/]

[2/] This, of course, will have no effect on petitioner's manslaughter conviction, nor

the sentence which he is presently serving as a result of that conviction. It means simply that the state is prohibited by the souble jeopardy clause from again trying petitioner for the same offense.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objections to the findings and recommendations herein contained. The parties are warned that any such objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its filing will bar an aggrieved party from attacking such findings and recommendations on appeal. Nettles v. Wainwright, 677 F. 2d 404 (5 Cir. 1982).

Respectfully submitted, this the 19th day of May, 1983.

s/ J. David Orlansky
United States Magistrate

APPENDIX

(The appendix to the Magistrate's Report and Recommendation has been omitted).